

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Mike Spalding and David Ottke

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: July 29, 2015

SUBJECT: Proposed initiative measure 2015-2016 #29 concerning the Public Accountability of State and Local Officers

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the **Colorado constitution** appear to be:

1. To provide a mechanism by which all state and local legislative and executive elective officials, and all state and local judicial officers, are accountable to voters.

2. To reestablish the recall process for all state and local legislative and executive elective officials and all state and local judicial officers.
3. To require all judicial officers to sign an affidavit consenting to the eligibility for recall or be subject to a retention election each November in even-numbered years.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

General questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state and local governments in this state? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, have the proponents considered incorporating a tax, fee, or some other mechanism that would allow some of the costs of the proposed initiative to be recovered?

Questions regarding Section 1 (“Accountability”):

4. This section makes the specified officers “accountable to voters as provided in this article”. Are the accountability measures in the proposed initiative exclusive? Or, to the extent that other existing provisions related to accountability are available under existing law, do these existing measures continue to apply? For example, would the impeachment and removal provisions of article XIII of the Colorado constitution, which arguably ensure public officer accountability, still be available? Would the retention procedures in Section 3 of the proposed initiative supersede extant provisions in article VI, section 25 of the Colorado constitution?

Questions regarding Section 2 (“Recall”):

5. In subsection (1):
 - a. The proposed initiative requires two registered electors to sign a recall request. What is the rationale for requiring two signatories? Does the

- “election office” receiving the request have a duty to verify that the persons are qualified to request a recall?
- b. Recall areas include court districts, presumably for judicial officers. Which judicial officers are subject to recall?
 - c. What constitutes a “statewide” recall election?
 - d. The proposed initiative tasks the Secretary of State with conducting statewide recalls. Currently, county clerks and recorders actually conduct statewide elections (under supervision by the Secretary of State). Is it your intent to change the current system?
 - e. Local elections, under the proposed initiative, must be conducted by the “election office of any county, or city and county, in the recall area”. Who is responsible for conducting a nonstatewide election when the recall area traverses county boundaries?
 - f. The governor is directed to replace, within two days, “election and judicial officers with conflicts of interest” for a “recall or recall case”.
 - i. To what actions does the two-day time limit apply [i.e., within two days of what occurrence(s)]?
 - ii. On what grounds would the governor determine that an election or judicial officer has a conflict of interest?
 - iii. When the governor finds that a conflict of interest exists, how does he or she select and install a replacement officer?
 - iv. Who notifies the governor of pending recall elections?
 - v. Is two days sufficient time to conduct an inquiry regarding whether conflicts of interest exist?
 - vi. To which “judicial officers” does this provision refer, and wouldn’t the governor’s replacement of such officers constitute a breach of separation-of-powers principles? Couldn’t a judicial officer simply recuse himself or herself?
6. With regard to subsection (2):
- a. Sample petition sections are required to contain “a lawful affidavit form usable in 2006 for state initiatives”. What is the purpose of this requirement? Would the proponents consider instead specifying the components of such affidavits in reenacted article XXI?
 - b. The provision stating that “perjury, forgery, and other felony frauds *shall be prosecuted*” (emphasis added) appears to disregard prosecutorial discretion by mandating prosecution every time one of the cited offenses has been committed. Is this the proponents’ intent?
 - c. Have the proponents considered the effects of placing detailed petition requirements in the state constitution which can only be changed by

another vote of the people? In the alternative, the proposed measure could specify a general requirement allowing flexibility in the details as circumstances warrant.

7. In subsection (3), the last sentence states, in its entirety: “Added entries shall be reviewed similarly.” Similarly to what? Would the proponents clarify this sentence?
8. Regarding subsection (4):
 - a. For purposes of determining the number of signers needed for a recall effort to proceed, what constitutes an "active registered elector" (i.e., as of what date or event)?
 - b. The second sentence of this subsection requires signers to merely be "registered electors". This seems to allow inactive registered electors to qualify to sign recall petitions. Is this the proponents' intent?
 - c. Each recall petition entry must be "reviewed individually, with no random or statistical sampling or machine reading". Why prohibit sampling and machine reading, especially if such methods and technology are used in other elections? Is it feasible to require that 100,000 signatures be individually assessed within fifteen days [per subsection (5) of this section], or does this create a logistical hardship or financial burden for elections administrators?
 - d. What is meant by the term “varied entries”?
9. Subsection (5) appears to vest the state Supreme Court with original jurisdiction to hear protests related to petitions.
 - a. Why allow these actions to be filed directly with the Supreme Court, as opposed to the election official or the district court?
 - b. This provision gives “recall filers and the officers” standing to have the Supreme Court conduct a “new review of disputed entries”. However, under subsection (4) of this section, entries are presumed valid unless the officer subject to recall “disproves validity by clear and convincing evidence in a court review”. If the term “court review” pertains to the Supreme Court process of subsection (5), would a recall filer ever need to initiate such an action?
10. According to subsection (6), “announced retirement shall stop recalls...”. What constitutes as *announced retirement*? What if an officer subject to recall mentions retiring in public, but then subsequently changes his or her mind? Why tie retirement to the mere announcement, as opposed to it being made effective?
11. Under subsection (7):
 - a. Successor candidates must file by 90 days before the election date, but under subsection (6), local elections must occur within 60 days after final

validation of the recall. Is it your intent to require successor candidate submissions to occur prior to final validation of the recall?

- b. You state that "[s]uccessor entry validation and extension time shall be 20% of that time for recall entries." Would you consider changing this figure from a percentage to days in order to be more specific?

- 12. Subsection (8) states that successful successors are "ineligible for recall elections for two years". Is shielding such officials from recall consistent with the objective of providing a means to make public officials accountable? What recourse does the public have against such officers during those two years?

Questions regarding Section 3 ("Judicial officers"):

- 13. If the proposed initiative becomes law, which (if any) "judicial officers", as that term is defined in Section 4(2) of the proposed initiative, will be subject to recall?
- 14. The proposed initiative requires each judicial officer, before taking or continuing office, to "sign a ten-word irrevocable statement of consent to or rejection of eligibility for recall under this article". Those officers rejecting eligibility are subject to biennial retention elections.
 - a. How does this provision affect or supersede the retention provisions of article VI, section 25 of the Colorado constitution?
 - b. What is the purpose of limiting the statement to ten words? Why have variances between such statements?
 - c. Why allow judicial officers to select the means by which they will be kept accountable to the public?
- 15. Judicial officers who choose not to be subject to recall are subject to regular retention election "each November in even-numbered years". Have the proponents considered specifying a minimum time that such judicial officers must serve before facing retention election? He or she would then have time to establish himself or herself, which would allow the electorate to make an informed decision on the retention question. A minimum period of service would provide logistical benefits, too. Under the current language, for example, a judicial officer appointed two weeks prior to a November election would apparently be eligible for retention election. That situation could present difficulties for election administrators arranging for ballot printing and delivery, for example.
- 16. Retention ballots must feature the judicial officer's website and "websites against retention".
 - a. If the judicial officer does not have a website, must he or she create one?

- b. There are no criteria for or limits on the “websites against retention”. Must *any* website against retention be listed? Who decides which websites to include on the ballot?
- 17. Officers recalled under this provision are ineligible for judicial office for ten years. Given the fact that a recall need not be premised on any cause, is this excessively punitive?
- 18. The last sentence states that “[a]ll judicial officers may be made uniformly eligible for recall by law”.
 - a. What do the proponents mean by “uniformly eligible”- that all such officers must be made eligible, if any are? Or that any officers made eligible must be governed by the same laws?
 - b. Are the proponents referring to the power of the General Assembly or the people to subject judicial officers to recall by enacting statutory law, or are the proponents referring to constitutional law? (If the latter, is it necessary to state this?)

Questions regarding Section 4 (“Enforcement”):

- 19. Under subsection (1), any adult citizen may circulate a petition. Further, recall donations and circulator payments “shall never be identified, reported, or limited”.
 - a. Is it the proponents’ intent that recall petition circulators and recall donors be completely unregulated? Could the General Assembly, for example, require all circulators to register or undergo training?
 - b. Currently, various provisions of article XXVI of the Colorado constitution and the "Fair Campaign Practices Act", article 45 of title 1, Colorado Revised Statutes, apply to recall efforts. It is the proponents' intent to except recall elections from the requirements?
- 20. Subsection (2) makes reenacted article XXI applicable to home rule governments as a matter of statewide concern. For local officers, is this provision compatible with article XX, section 6(d) of the state constitution, which commits “[a]ll matters pertaining to municipal elections in [a home rule] city or town” to that home rule government’s oversight? Does this portion of subsection (2) comport with traditional analyses of home rule authority?
- 21. Subsection (2) forbids recalled officers from holding elective office for five years from the date of the recall.
 - a. Given the fact that a recall need not be premised on any cause, is this excessively punitive?
 - b. Why extend this five-year ban to officers who resigned or announced retirement during the recall effort but prior to the election? Does the

totality of the proposed initiative disincentivize resignation in all instances?

22. What is the rationale for limiting officers eligible for recall to one biennial recall election under subsection (2)? Hypothetically, if any officer is sought to be recalled in the first year of his or her term, survives that recall effort, and subsequently commits misfeasance or malfeasance, he or she would be ineligible for recall for another 3 years. Does this idea make sense on policy grounds?
23. Subsection (2) allows up to five officers in the same recall area to be listed on a single recall petition. How would a signer indicate his or her support for recall of fewer than the five listed officials?
24. Subsection (2) further requires the Secretary of State to "always" list on his or her office's website every officer eligible for recall, and "all persons ineligible for recall until the election date on that website".
 - a. "All persons ineligible" for recall is an enormous number of people. Do the proponents instead want the website to list *all state and local officers* ineligible for recall?
 - b. Is the Secretary of State the appropriate official to provide such information for those offices for which he or she is not the designated recall election official?
25. Subsection (3) allows any Colorado adult to file an action in "any district court" to enforce reenacted article XXI (if unrelated to specific petition validity). Do the proponents intend to omit all traditional standing and venue considerations from this provision? Under this construction, for example, could a person who resides in Moffat County file an action with the 19th Judicial District Court in Greeley, Colorado, to enforce recall provisions against a member of the board of directors of the Alamosa Mosquito Control District?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.

2. In subsection (2) of section 2 you use the language "sample petition section". It is recommended that, in order to stay consistent throughout the proposed initiative, you continue to use this language. For example, in subsection (3) of section 2, instead of "sample section" would you consider using "sample petition section" again for consistency?
3. It is standard drafting practice to avoid using archaic terms. In subsection (8) of section 2, instead of using "If no successor be elected", use "If no successor is elected".
4. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The first letter of the first word of each entry of an enumeration paragraphed after a colon should be large-capitalized.
5. It is standard drafting practice to have the definitions section at the beginning of a provision. Would you consider moving the definitions in subsection (2) of section 4 to section 1 and renumbering the subsequent sections so that the reader knows what the definitions are at the beginning of the proposed initiative rather than at the end of it?
6. The following is the standard drafting language used for creating a definition:
"As used in this article, unless the context otherwise requires, 'elective' means in an office subject to regular, special, or retention election, even if term-limited".